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HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1953

No. 404

ALICE D. JACOBSON, ADMINISTRATRIX,
Petitioner

v.

NEW YORK, NEW HAVEN & HARTFORD
RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

GEORGE P. LORDAN, ESQ.
HERBERT E. TUCKER, JR., ESQ.
CARDOZO, LORDAN, KATZ & TUCKER
Attorneys for the Petitioner

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OPINIONS BELOW

The opinion of the Court of Appeals (R. 16) is reported at 206 Fed. 2nd 153 and the opinion of the District Court (R. 10) is reported at 109 Fed. Supp. 513.

JURISDICTION

The jurisdiction of this Court rests upon the Constitution of the United States, Article III, Sec. 2---actions between citizens of different states.

STATUTES INVOLVED

Commonwealth of Massachusetts, Acts of 1872 Chapter 171, and Public Acts of Connecticut, Vol. 1866-1871, Page 713, chapter CXXIX, Acts of 1871, the pertinent portions of which are set out in the Argument.

QUESTION PRESENTED

The decree below was entered July 14, 1953. On October 9, 1953, the petitioner filed a petition for certiorari, to review the decision of the Court of Appeals. This petition for certiorari was granted on November 30, 1953, limited to Question No. 1 presented by the petition for the writ which reads as follows:

> "Was there diversity of citizenship even though the defendant (a multiple corporation) was also incorporated in Massachusetts, which would confer jurisdiction upon the United States District Court for the District of Massachusetts?"

STATEMENT

The Petitioner, as Administratrix, by her complaint (R. 1) filed March 18, 1952, and thereafter amended (R. 5), seeks to recover for the death and conscious suffering of Margaret B. Price, whom, it was alleged, was injured and died from injuries sustained as a result of the negligence of the Defendant. At the time of the accident the deceased was a passenger on a train operated by the Defendant en route from Lake Worth, Florida to Boston, Massachusetts (R. 2). Jurisdiction of the Court is based upon diversity of citizenship, it being alleged that the Defendant corporation was of Connecticut and the Plaintiff of Massachusetts.

The Defendant moved to dismiss the bill (R. 3) for the reason that the Defendant is also incorporated in Massa-

chusetts. This motion was denied (R. 3). On August 8, 1952, the Defendant filed a motion (R. 4) for the Court to revoke its order on the Defendant's motion to dismiss which motion was allowed, unless an amendment to the complaint was filed supporting jurisdiction. Plaintiff filed an amended complaint (R. 5) on September 30, 1952 to which the Defendant filed a motion to dismiss (R. 9). On January 19, 1953 Judgment for dismissal (R. 10) was entered. From this judgment the Plaintiff appealed to the First Circuit Court of Appeals and in the opinion of the Court (R. 16) the judgment of the District Court (R. 10) was affirmed. Thereafter this Court granted certiorari.

Article III of the Constitution of the United States, Section 2 defines the jurisdiction of the Federal Courts and insofar as the purposes of this case are concerned, the applicable portion thereof is as follows:-

ARGUMENT.

> "The judicial power shall extend to all cases by the citizens of different states."

At the time of the adoption of the Constitution, the framers thereof, when referring to citizens, did not include corporations because at that time there were very few corporations and those which existed were for the most part toll bridges, waterways, etc.

In order to create jurisdiction in the Federal Courts, the Supreme Court created the fiction of citizenship. The fiction of citizenship has taken on two concepts. The first concept appeared from about 1809 to about 1844 and is set forth in the decision of *Bank of the United States* v. *Devereaux*, 5 Cranch 61. In that case, the United States Supreme Court, speaking through Chief Justice Marshall, made it clear that a corporation, as such, is not a citizen, and further said that the pre-requisite of diversity of

citizenship exists when, and only when, there is a complete diversity of state citizenship between the shareholders of a corporate party and opposing party. The Court further resolved to consider the character of the individuals who composed the corporation even when they used the name of the corporation for the privilege of asserting their corporate rights. The privilege of citizens of a state different from that of the defendant to sue in the Federal Court is not lost by their incorporation. 5 Cranch 61 at 86-91 (*Supra*). The Court went on to sustain the averment of the citizenship of the stockholders as being of Pennsylvania whereas the defendants were of Georgia and thus *created* jurisdiction in the Federal Court by reason of the diversity of citizenship.

In 1844, however, the Supreme Court enunciated a new doctrine in the case of *Louisville, Cincinnati & Charleston R.R.* v. *Letson*, 2 Howard 497. Mr. Justice Wayne speaking for the Court as follows said:

> "A corporation created by a state to perform its functions under the authority of that state and only suable there, though it may have members out of the State, seems to us to be a person, though an artificial one, inhabiting and belonging to that State, and therefore, entitled, for the purpose of suing and being sued, to be deemed a citizen of that State".

Corporations thus became citizens by "judicial baptism" said Mr. Justice Daniel. *Marshall* v. *Baltimore & Ohio R.R.*, 16 Howard 314 at 344.

Thereafter the Supreme Court stated that a corporation cannot be a citizen. However, a suit by or against a corporation may be regarded as a suit by or against its shareholders, and if their citizenship is appropriate, jurisdiction exists. To make their citizenship appropri-

ate, the Court cut off all inquiry in this respect and stated that the shareholders of every state corporation shall be deemed citizens of the state which incorporat[illegible] it. *Marshall* v. *Baltimore & Ohio R.R.*, 16 Howard 314 at 329.

In a prior decision, *Ohio & Mississippi R.R.* against *Wheeler* 1 Black 286 at 296, however, Chief Justice Taney rephrased the language of the Letson case and said:

> "Where a corporation is created by the laws of a state, the legal presumption is that its members are citizens of the state and that a suit by or against a corporation in its corporate name must be presumed to be a suit by or against citizens of the state which created the corporate body; and that no averment or evidence to the contrary is admissible."

This latter case was a suit by an Ohio and Indiana corporation against a citizen of Indiana in the United States Circuit Court for Indiana and it was held that the United States Circuit Court had no jurisdiction. This doctrine seems to have been followed in the case of *Chicago & Northwestern* v. *Whitten*, 13 Wall 220 and in the *Southern R.R. Co.* v. *Allison*, 190 U.S. 326, Sup. Ct. Rep. 713; BUT there was a change in the doctrine in the case of *Patch* v. *Wabash*, 207 U.S. 277, 28 Sup. Ct. Rep. at 80. That was a suit brought in the state court of Illinois by an administrator against a defendant railroad incorporated both in Illinois and in Ohio. The railroad attempted to remove the case to the Federal District Court. The United States Supreme Court, speaking through Justice Holmes, said as follows:

> "A corporation organized and existing under and by virtue of the laws of several states including the

one in which suit against it is brought, must be regarded as a citizen of the latter state for the purpose of determining its right to remove the cause to the Federal Circuit Court, especially where the Constitution and the laws of that state (Illinois) require that a majority of the directors shall be residents and the corporation shall keep a general office in that state".

It is to be noted that in the instant case there is no requirement that the shareholders in the New York, New Haven and Hartford R.R. Co. be citizens of Massachusetts or, in fact, citizens of any one particular state. It is upon this ground we feel that the two cases are distinguishable. Because of this doctrine, two unique situations result.

1. In the case of *Lakeshore and M.S. Railway* v. *Eder*, 174 Federal 944 CCA (6th) 1909, a corporation alleging itself to be an Ohio corporation sues a citizen in the Federal Court of Indiana although it is actually also incorporated in Ohio, the Federal Court may take jurisdiction. The necessary diversity of citizenship is supplied by the fiction that all the shareholders are citizens of Ohio.

2. If the same corporation alleges itself to be an Indiana corporation and sues a citizen of Ohio in the Federal Court of Ohio, diversity of citizenship is supplied by the fiction that all the shareholders are citizens of Indiana, thus giving to this artificial being citizenship in two states. It therefore can be seen that from this paradoxical situation it is possible for a corporation to impose citizenship upon the Court whenever it decides to have a case in which it becomes involved to be heard in the Federal District Courts.

To say that a corporation does not exist beyond the boundaries of the state creating it is an absurdity. It does exist through its officers and agents and it does act through them. When a train of the defendant corporation passes the boundaries of Connecticut into Massachusetts, does the ownership of the train change to that of the Massachusetts corporation? Does it cease at that point to be a Connecticut corporation? When and at what point does this transition take place?

The defendant corporation is but one railroad. It has the same officers and the same shareholders. To quote the language of the Gavin Case, *Gavin* v. *Hudson & Manhattan R.R. Co.* 185 Federal (2) 104 (CA 3d 1950):

> "There is but one railroad no matter how many certificates of incorporation hang on its walls."

How then can a judicial fiction constitute this railroad a citizen of many states. It is the law of the land that a Plaintiff, a citizen of Massachusetts can bring suit against a multi-incorporated railroad which is also incorporated in New Hampshire, in the United States District Court for the District of New Hampshire. *Boston and Maine R.R.* v. *Breslin,* 80 F 2d 949 Certiorari denied 297 U.S. 715, 56 Sp. Ct. Rpr. 590, 80 L Ed 1000. *Boston and Maine R.R.* v. *Hurd,* 100 F 116 Certiorari denied, 184 U.S. 700, 22 Sp. Ct. 939.

This makes the matter of Federal jurisdiction in these causes a matter of carfare. In other words one without funds to travel to another state runs the risk of losing what rights he may be entitled to. As was stated in the Gavin case.

"Such a rule if adopted may be an effective means of promoting additional passenger business, but it would be pretty hard to explain its reason to the layman".

We cannot agree with the theory laid down in *Seavey* v. *The Boston and Maine R.R.* 197 Fed 2nd 485 which said that the layman's view is not pertinent.

We submit that if a legal rule fails to satisfy the untechnical requirements of ordinary common sense, the premises behind the rule should be re-examined. This judicial fiction was created only so that jurisdiction on the ground of diverse citizenship could be obtained. This presumption of citizenship should be confined to the state of original incorporation. In that manner only we will have a clear rule which even the layman will understand. It would seem to us that the better rule to be adopted is that contained in the restatement of the law. Let us adopt the rule suggested in the Restatement of the Law 203-207 as follows:

"Suit may be brought by and against multiple corporations in any of the incorporating states."

CONCLUSION

For the reasons stated, it is submitted that the United State District Court for the District of Massachusetts did have jurisdiction of the amended bill of complaint.

By Attorneys for the Petitioner,
GEORGE P. LORDAN, ESQ.,
HERBERT E. TUCKER, JR., ESQ.,
CARDOZO, LORDAN, KATZ & TUCKER

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Petitioner,

—against—

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

RESPONDENT'S BRIEF

EDWARD R. BRUMLEY,
Counsel for Respondent,
Room 3841, Grand Central Terminal,
New York 17, N. Y.

R. M. PEET,
N. W. DEERING,
Of Counsel.

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RESPONDENT'S BRIEF

Opinions of the Courts Below

The opinion of Judge Ford of the United States District Court for the District of Massachusetts (R. 10-12) is reported in 109 F. Supp. 513.

The opinion of the United States Court of Appeals for the First Circuit by Chief Judge Magruder (R. 16-24) is reported in 206 F. 2d 153.

Jurisdiction

The judgment of the Court of Appeals was rendered and filed on July 14, 1953 (R. 24). Petition for writ of certiorari was filed on October 9, 1953. Certiorari was granted on November 30, 1953 (R. 25).

This Court has jurisdiction under 28 U. S. C. §1254 (1).

Question Presented

Review herein was granted, limited to question No. 1 of the petition, which reads as follows:

> "Was there diversity of citizenship even though the defendant (a multiple corporation) was also incorporated in Massachusetts, which would confer jurisdiction upon the United States District Court for the District of Massachusetts?" (R. 25).

The question could be reframed as follows:

> "Did the United States District Court for the District of Massachusetts correctly dismiss the complaint for lack of diversity of citizenship, the plaintiff being a citizen of Massachusetts, the defendant being a consolidated corporation incorporated voluntarily and at the same time under the laws of Massachusetts and under the laws of Connecticut, and the complaint alleging a tort occurring in Massachusetts and governed by the substantive law of Massachusetts?"

Constitution and Statutes Involved

The judicial power extends to all cases "between Citizens of different States". Constitution, Art. 3, §2, cl. 1. The district courts have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between "Citizens of dif-

ferent States". 28 U. S. C. §1332 (a) (1). The Massachusetts and Connecticut charters of the New York, New Haven and Hartford Railroad Company are set out in the Appendix.

Statement of the Case

The complaint alleges (R. 1-2) that plaintiff, the administratrix of the estate of Margaret B. Price, and deceased were of Melrose, Massachusetts, and that the defendant was a Connecticut corporation; that on May 2, 1950 plaintiff's deceased sustained fatal injuries while a passenger of defendant, due to its negligence; that an action has accrued for conscious pain and suffering, and another action for the use of next of kin. The accident took place in Boston (R. 17).

The defendant moved to dismiss the action on the ground that it was a domestic corporation duly organized under the laws of the Commonwealth of Massachusetts, as well as under the laws of Connecticut, and that therefore there was no diversity of citizenship (R. 3). The motion was denied for reasons stated in *Gavin* v. *Hudson & Manhattan R. Co.*, 185 F. 2d 104 (3d Cir. 1950), and later defendant's motion for rehearing and to dismiss was allowed, unless an amendment was filed supporting jurisdiction (R. 3-4).

The plaintiff filed an amended complaint (R. 5-9) reasserting the original cause of action and alleging also violation of a federal statute. Defendant moved to dismiss the amended complaint (R. 9). The district court granted the motion (R. 10).

The United States Court of Appeals found no diversity of citizenship, refused to overrule its own controlling decision in *Seavey* v. *Boston & Maine R. R.*, 197 F. 2d 485 (1st Cir. 1952), and found that the new cause of action based on the federal statute was not within the jurisdiction of the court (R. 16-24). It treated the case as a suit by a citizen of Massachussetts against "a corporation incorporated under the laws of Massachusetts on an alleged tort occurring in Massachusetts and governed in its substantive aspects by the local law of Massachusetts" (R. 17). It affirmed the order of the district court (R. 24).

Summary of Argument

The New York, New Haven and Hartford Railroad Company came into being by acts of Connecticut in 1871 and of Massachusetts in 1872. Since 1872 it has been a domestic corporation in Massachusetts. The incorporation in Massachusetts was free and substantially simultaneous with that in Connecticut.

In the case of multi-state corporations the entity must be regarded as solely incorporated in each state. For purposes of diversity jurisdiction the defendant must be treated as a citizen of Massachusetts, when sued in Massachusetts.

ARGUMENT

I

The decisions in *Seavey* v. *Boston & Maine R. R.*, 197 F. 2d 485 (1st Cir. 1952) and in the present case are to be preferred over the decision in *Gavin* v. *Hudson & Manhattan R. Co.*, 185 F. 2d 104 (3rd Cir. 1950).

It may be useful at the outset to point out the conflict between the First and Third Circuits. In *Seavey* v. *Boston & Maine R. R.*, 197 F. 2d 485 (1st Cir. 1952) a citizen of Massachusetts sued a New York and Massachusetts corporation but described it as a New York corporation. It was held that the federal court in Massachusetts did not have jurisdiction.

Judge Woodbury's opinion rejects the decision in the *Gavin* case and argues: (1) By firmly established legal fiction a corporation is treated as a citizen, and a multi-state corporation is regarded in each state as solely domesticated therein. (2) These basic fictions upon which the concept of corporation citizenship rests are practical and lead to a logical conclusion. (3) It is a rule that under diversity jurisdiction a citizen of another state may sue a multi-state corporation in the federal court of a state where it is incorporated even though it is also incorporated in the state of plaintiff's citizenship. The Supreme Court has stressed the fact that a multi-state corporation is a separate legal entity in each state of its incorporation. (4) The rule has been followed that

a suit may not be brought against a multi-state corporation in the federal court of a state of incorporation by a citizen of that state. This is based on the legal fiction of corporate citizenship of the state of incorporation and the further fiction that the entity is regarded as solely incorporated therein. (5) Following this well established rule will reduce the number of cases in the federal courts, and furnish a clear guide for practitioners.

Chief Judge Magruder, writing the opinion for the Court of Appeals in the case at bar, adhered to the decision in the *Seavey* case.

In *Gavin* v. *Hudson & Manhattan R. Co.*, 185 F. 2d 104 (3rd Cir. 1950), a citizen of New Jersey sued in the federal court for New Jersey a New York and New Jersey corporation but described it as a New York corporation. It was held that the federal court had jurisdiction.

Judge Goodrich's opinion argues: (1) A corporation is not a citizen of any state. (2) The rule in the multiple incorporation situation is not clear and practical. (3) There is no Supreme Court decision directly on the subject. (4) Suit by or against a multiple-state corporation may be brought by or against it as a corporation of any of the states in which incorporated. (5) This rule does not require useless ritual in the institution of a suit, and establishes a clear guide.

It is submitted that this view recognizes a corporation as a citizen but gives to multi-state corporations greater opportunities to get into federal courts than to other forms of business associations and to ordinary

citizens. The decision would permit multi-state corporations always to sue in the federal courts and always to remove from a state court, regardless of considerations of local prejudice. It extends diversity jurisdiction when the federal calendars are already overcrowded. It hampers development of local law by state courts, and needlessly requires federal courts to decide matters of local concern. It ignores the policy of strict construction of the Judiciary Act. See *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283, 288 (1938); *Shamrock Oil Co.* v. *Sheets*, 313 U. S. 100, 108 (1941); *Indianapolis* v. *Chase Nat. Bank*, 314 U. S. 63, 76-77 (1941); and *Thomson* v. *Gaskill*, 315 U. S. 442, 446 (1942).

The decision in the *Gavin* case has been adversely criticized in 64 Harv. L. Rev. 1009 (1951); 4 Univ. of Fla. L. Rev. 410 (1951); 9 Wash. & Lee L. Rev. 96 (1952); 20 Fordham L. Rev. 203 (1951); 14 Ga. B. J. 374 (1951); 3 Ala. L. Rev. 397 (1951); 14 Ohio L. J. 106 (1953); and 7 Rutgers L. J. 418 (1953).

It may be noted that plaintiff advances a third rule—a presumption of citizenship confined to the state of original incorporation (petitioner's brief, p. 8). This rule is particularly inappropriate in cases like the one at bar where incorporation in two states was voluntary and substantially simultaneous. It lacks substantial judicial authority, and advances an irrelevant criterion.

II

The defendant should be treated as a citizen of Massachusetts for the purpose of federal diversity jurisdiction.

The Hartford and New Haven Railroad Company was incorporated in Connecticut in 1833. Private Laws of Conn., Vol. I, p. 1002. The Hartford and Springfield Railroad Company was incorporated in Connecticut in 1835 (Private Laws of Conn., Vol. I, p. 1006), and in Massachusetts in 1839 (Mass. Acts and Resolves, 1839, ch. 101), and their consolidation was provided for in 1840 (Private Laws of Conn., Vol. IV, p. 917). In 1847 Massachusetts provided for the union of the Hartford and Springfield with the Hartford and New Haven Railroad Company (as already provided for in 1844 by Massachusetts and Connecticut, Private Laws of Conn., Vol. IV, pp. 901, 967; Mass. Acts and Resolves, 1844, ch. 28, and 1845, ch. 42) under the name of the Hartford and New Haven Railroad Company and subject to the laws of Massachusetts. Acts of 1847, ch. 244.

The New York and New Haven Railroad Company was incorporated in Connecticut in 1844. Private Laws of Conn., Vol. IV, p. 1020.

In 1871 the Hartford and New Haven Railroad Company was consolidated with the New York and New Haven Railroad Company under the name of the New York, New Haven and Hartford Railroad Company. Conn. Public Acts, 1871, ch. 129 (see Appendix, pp. 19 to 23).

In 1872 Massachusetts, by Acts of 1872, ch. 171, authorized the Hartford and New Haven Railroad

Company to consolidate with the New York and New Haven Railroad Company, under the name of New York, New Haven and Hartford Railroad Company (see Appendix, pp. 24 to 26).

On August 6, 1872 an agreement was entered into by the two new railroad companies and filed in Massachusetts on the same day, which agreement conformed to the provisions of the charters.

The opinion in *Attorney General* v. *New York, N. H. & H. R. R.*, 198 Mass. 413 (1908) says of the defendant there (p. 417):

> ". . . there is nothing that makes it any more a domestic corporation in one of the States than in the other. It is a foreign corporation in neither of them. It is a domestic corporation in each of them. . . . We are dealing now with a legislative consolidation, or merger, of two corporations, upon equal terms, which this was; and not mere permission to a corporation of one State to enter another State and acquire property or franchises there."

See also Opinion of Attorney-General of Massachusetts, Public Documents 1895, No. 12, p. 43; Official Opinions of The Attorneys-General of the Commonwealth of Massachusetts, Vol. I, 1891-1898, pp. 118-140. This opinion reads in part as follows (p. 136):

> "The charter by Massachusetts of the New York, New Haven & Hartford Railroad Company (St. 1872, c. 171), must be regarded as concurrent legislation with the charter of Connecticut. The Massachusetts act does not, indeed, refer in terms

> to the Connecticut act. But it purports to create a new corporation which should succeed to the rights of two existing corporations, one chartered solely by Connecticut and the other by the two States expressly concurring, and which new corporation should operate and maintain a railroad line in both States. This, obviously, could not be done except by concurrence of Connecticut; and such concurrence must have been in contemplation by the Legislature of Massachusetts when it gave a charter professing to deal with a Connecticut corporation. Moreover, the Massachusetts charter was granted the next year after the Connecticut charter, and was so identical in its terms and provisions that it is inconceivable that the similarity could have been accidental. The agreement for merger filed in the office of the Secretary of the Commonwealth, which was a necessary antecedent to the taking effect of the charter, recited that it was executed in pursuance of authority granted by the legislatures of both States."

The Hartford & Springfield Railroad Corporation was created from natural persons by Massachusetts, succeeded by the Hartford & New Haven Railroad Company, in turn succeeded by the New York, New Haven & Hartford Railroad Company. The last was held to be "a corporation created by the legislature of Massachusetts from natural persons" and, for all purposes of federal jurisdiction, a citizen of Massachusetts. *Smith* v. *New York, N. H. & H. R. Co.*, 96 Fed. 504, 511 (C. C. D. Mass. 1899). See also *Goodwin* v. *New York, N. H. & H. R. Co.*, 124 Fed. 358 (C. C. D. Mass. 1903); *Geoffroy* v. *New York, N. H. & H. R.*

Co., 13 F. 2d 947 (D. C. R. I. 1926), affd. 16 F. 2d 1017 (1st Cir. 1927).

In *Wadell* v. *Green Textile Associates*, 92 F. Supp. 738 (D. C. Mass. 1950), the court took judicial notice that the New York, New Haven & Hartford Railroad Company was a Massachusetts corporation chartered by a special act of the legislature, St. 1872, c. 171.

The consolidation was voluntarily made by the constituent corporations, with the assent of the stockholders, pursuant to legislation in two states designed to take effect concurrently. *Mackay* v. *New York, N. H. & H. R. Co.*, 82 Conn. 73 (1909).

"What constitutes sufficient legislation to make a state corporation is ostensibly a matter of state law." Note, 44 Harv. L. Rev. 1106, 1107 (1931). See *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64 (1938). The judgment of the state courts should be accepted unless a contrary view is demanded for constitutional or federal statutory reasons. *Thomas* v. *Board of Trustees*, 195 U. S. 207 (1904). The real test is the intention of the legislature, *Louisville, New Albany & Chicago Ry.* v. *Louisville Trust Co.*, 174 U. S. 552 (1899), subject to limitation of the state's power directly to affect access to the federal courts, *Terral* v. *Burke Construction Co.*, 257 U. S. 529 (1922), or indirectly to do this by involuntary or compulsory incorporation, *Missouri Pac. Ry. Co.* v. *Castle*, 224 U. S. 541 (1912); *Southern Ry.* v. *Allison*, 190 U. S. 326 (1903); *St. Louis & San Francisco Ry.* v. *James*, 161 U. S. 545 (1896). Of course, a mere permission to do business does not amount to incorporation. *Pennsylvania R. Co.* v. *St. Louis, A. & T. H. R. Co.*, 118 U. S. 290 (1886); *Martin's Administrator* v. *Balti-*

more & Ohio R. R. Co., 151 U. S. 673 (1894); *Louisville, New Albany & Chicago Ry.* v. *Louisville Trust Co., supra*, 174 U. S. 552 (1899). Under any criterion the defendant in the case at bar would be held to be a Massachusetts corporation, and also a Connecticut corporation.

Judge Goodrich expressed the view in *Gavin* v. *Manhattan R. Co., supra*, 185 F. 2d 104, 107, that the Supreme Court authorities do not help very much. An analysis of its decisions from 1809 to 1912 clearly demonstrates that a citizen of a state cannot sue in a federal court of that state a corporation incorporated in the same state, even though also incorporated elsewhere.

In *Bank of the United States* v. *Deveaux*, 5 Cranch. 61 (U. S. 1809), the stockholders of the corporate party were citizens of a state diverse from that of the adverse parties. The Court considered the citizenship of the individuals who composed the corporation as controlling and held that the federal court had jurisdiction. In *Louisville, Cincinnati & Charleston R. R.* v. *Letson*, 2 How. 497 (U. S. 1844), it was held that the corporation itself should be deemed a citizen of the state which created it. In *Marshall* v. *Baltimore & Ohio R. R.*, 16 How. 314 (U. S. 1854), it was held that there was a conclusive presumption that all the shareholders of a corporation were citizens of the state which created it. In *Ohio & Miss. R. R.* v. *Wheeler*, 1 Black 286 (U. S. 1862), suit was brought in the federal court for the district of Indiana by a corporation created by the laws of Indiana and Ohio against a citizen of Indiana. The Circuit Court had no jurisdiction. The corporate entities were treated as separate and distinct. To the same effect for the

same reasons is *Muller* v. *Dows,* 94 U. S. 444 (1876), where the federal court in Iowa was held to have jurisdiction of a suit by a Missouri plaintiff against a corporation of Iowa and Missouri.

The federal court in Wisconsin had jurisdiction of a suit by an Illinois citizen against an Illinois and Wisconsin corporation. *Chicago & N. W. Railway Co.* v. *Whitton,* 13 Wall. 270 (U. S. 1872). The State of Alabama sued, in an Alabama state court, a corporation organized under the laws of Alabama and Tennessee. The suit was removed to the United States court, then remanded to the state court. *Memphis & Charleston R. R. Co.* v. *Alabama,* 107 U. S. 581 (1882). The opinion says (p. 585):

> "The defendant, being a corporation of the State of Alabama, has no existence in this State as a legal entity or person, except under and by force of its incorporation by this State; and, although also incorporated in the State of Tennessee, must, as to all its doings within the State of Alabama, be considered a citizen of Alabama, which cannot sue or be sued by another citizen of Alabama in the courts of the United States."

Nashua & Lowell R. R. v. *Boston & Lowell R. R.,* 136 U. S. 356 (1890), may be inconsistent with other decisions of this Court. The case held that the federal court in Massachusetts had jurisdiction of a suit brought by a New Hampshire and Massachusetts corporation against a Massachusetts corporation.

In *Patch* v. *Wabash R. R.,* 207 U. S. 277 (1907), suit was brought in an Illinois state court. Defendant filed a petition for removal to a United States court.

Plaintiff was a citizen of Illinois, as was defendant by consolidation. It was held that the defendant existed in Illinois and could not escape state jurisdiction by the fact that it was also incorporated in Ohio. It was assumed that the incorporations were substantially simultaneous and free.

The opinion by Mr. Justice Holmes says (pp. 283-284):

> "The defendant exists in Illinois by virtue of the laws of Illinois. It is alleged to have incurred a liability under the laws of the same State, and is sued in that State. It cannot escape the jurisdiction by the fact that it is incorporated elsewhere . . . In the case at bar the incorporations must be taken to have been substantially simultaneous and free . . . We are of opinion that the defendant must be regarded in this suit as a citizen of Illinois, and therefore as having had no right to remove."

This Court has established certain definite rules. A corporation freely formed in two or more states is regarded as a citizen of each of them in determining questions of diversity of citizenship. This is based on the separate legal entity theory.

If a suit is brought in an incorporating state, the corporation is treated as a citizen thereof. It follows that if a suit is brought in an incorporating state by a citizen of another state, there is diversity, even though the plaintiff and defendant are citizens of the other state.

"Thus, a multi-state corporation can neither sue in nor remove to a federal court in an incorporating

state when the other party is a citizen of that state." 64 Harv. L. Rev. 1009, 1010 (1951).

Lower federal courts have followed these basic rules. In *Boston & Maine R. R.* v. *Hurd,* 108 Fed. 116 (1st Cir. 1901), cert. denied 184 U. S. 700, a Massachusetts citizen was allowed to sue in federal court in New Hampshire a railroad incorporated in both states. The same rule was adhered to in *Peterborough* v. *Boston & Maine R. R.,* 239 Fed. 97 (1st Cir. 1917), and in *Boston & Maine R. R.* v. *Breslin,* 80 F. 2d 749 (1st Cir. 1935), cert. denied 297 U. S. 715.

The Second, Fourth, Sixth, Seventh and Eighth Circuits agree with the First Circuit. *Lucas* v. *New York Cent. R. Co.,* 88 F. Supp. 536 (S. D. N. Y. 1950); *Murphy* v. *Hudson & Manhattan R. Co.,* 45 F. Supp. 720 (E. D. N. Y. 1942); *Town of Bethel* v. *Atlantic C. L. R. Co.,* 81 F. 2d 60 (4th Cir. 1936), cert. denied 298 U. S. 682; *Lake Shore & M. S. Ry. Co.* v. *Eder,* 174 Fed. 944 (6th Cir. 1909); *Starke* v. *New York, Chicago & St. Louis R. Co.,* 180 F. 2d 569 (7th Cir. 1950); *Missouri Pac. Ry. Co.* v. *Meeh,* 69 Fed. 753 (8th Cir. 1895).

Writers have recognized these principles. "But where a corporation is chartered by two States the corporation which acts in each State is the corporation there chartered . . . Suit against such a consolidated corporation in one of the States which has chartered it is therefore suit against a corporation of that State." Joseph H. Beale, Jr., *Corporation of Two States,* 4 Col. L. Rev. 391, 406 (1904). See Dobie, *Handbook of Federal Jurisdiction and Procedure* (1928), §65, pp. 203-204; Williams, *A Treatise on*

Federal Practice (2nd ed. 1927), §13, pp. 169-170; Rose, *Jurisdiction and Procedure of the Federal Courts* (4th ed. 1931), §272, pp. 259-260; Brown, *Guide to Federal and Bankruptcy Practice* (1933), §10, p. 71. The basis of the separate legal entity theory is discussed in *Multiple Incorporation as a Form of Railroad Reorganization,* Comment, 46 Yale L. J. 1370 (1937). A multiple corporation should be treated as a citizen of all the states in which it is truly incorporated, which is in line with the policy in favor of limiting diversity jurisdiction. Note, *The Effect of Multiple Incorporation on Access to the Federal Courts,* 44 Harv. L. Rev. 1106 (1931).

In the last thirty years, elimination or restriction of diversity jurisdiction has frequently been advocated.[1] Today the diversity problem insofar as it concerns multi-state corporations affects only railroads. 46 Yale L. J. 1370, 1382 n. 88, *supra.* Under modern consolidation statutes, multi-state corporations are no longer created. 25 Tulane L. Rev. 126 (1950).

The basic rules enunciated by this Court have now been long established and have never been altered despite many attempts in Congress to do so. Any change in these rules should be accomplished by re-

[1] See Frankfurter and Landis, *The Business of the Supreme Court of the United States,* 40 Harv. L. Rev. 834, 871, 1111 (1927); Friendly, *The Historic Basis of Diversity Jurisdiction,* 41 Harv. L. Rev. 483 (1928); McGovney, *A Supreme Court Fiction,* 56 Harv. L. Rev. 853, 1090, 1225 (1943); Frankfurter, *Distribution of Judicial Power between United States and State Courts,* 13 Corn. L. J. 499 (1928); Warren, *New Light on the History of the Federal Judiciary Act of 1789,* 37 Harv. L. Rev. 49 (1923); Warren, *Corporations and Diversity of Citizenship,* 19 Va. L. Rev. 661 (1933); Comment, *Statutory Merger and Consolidation of Corporations,* 45 Yale L. J. 105 (1935).

vision of the Judicial Code. No constitutional question is involved and Congress may modify the jurisdiction. *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 233-234 (1922).

We submit, therefore, that in this case the plaintiff and defendant should be treated as citizens of Massachusetts. Neither of them can complain of an unfriendly state forum. A contrary decision would unnecessarily extend diversity jurisdiction, add to overcrowded federal calendars, and disregard state independence on a matter of state law.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be affirmed.

EDWARD R. BRUMLEY,
Counsel for Respondent.

R. M. PEET,
N. W. DEERING,
Of Counsel.

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